IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No.

THE UNITED STATES OF AMERICA, on the relation of RAYMOND J. NITKEY, and RAYMOND J. NITKEY in his own behalf,

Petitioner,

vs.

CHARLES G. DAWES, et al.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 151 Federal Reporter, 2d 639. The opinion is also printed in full in the record (R. 89-97).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (U. S. Code, Title 28, Section 347). The Circuit Court of Appeals has in this case "decided a fed-

eral question in a way probably in conflict with applicable decisions of this Court." (Supreme Court Rule 38, par. 5 (b)).

Statement of the Case.

This is a *qui tam* action under the Informer's Act, (which appears as Appendix I hereto), and with respect to such actions Section 235 of Title 31, U. S. Code provides:

> "Every such suit shall be commenced within six years from the commission of the act, and not afterward."

The present suit, in which a complaint was filed on June 22, 1943, and an amended complaint on August 19, 1943, (R. 2, 15) relates to a Government loss of some fifteen million dollars (R. 67-69) as the result of a $90,000,000 loan to the Central Republic Bank and Trust Company of Chicago by the Reconstruction Finance Corporation on June 27, 1932, and a transfer on October 5, 1932, of $50,000,000 of such loan to a newly organized City National Bank and Trust Company.

The City National Bank is made a defendant (R. 18, 19) on the ground that under Illinois statutory provisions it has assumed liability to the Reconstruction Finance Corporation (*Ill. Revised Statutes*, ch. 16½, sec. 12), and has fraudulently concealed such liability. The other defendants are individuals who (1) as officers and directors of the Central Republic Bank and Trust Company participated in obtaining the loan of $90,000,000 from the Reconstruction Finance Corporation; (2) participated in the organization of the City National Bank and Trust Company of Chicago; became officers and directors of that company; and obtained the transfer of $50,000,000 of such loan from the Central Republic Bank and Trust Company to the City National Bank and Trust Company without assuming, directly or indirectly, obligations other than deposit liabilities in violation of what petitioner alleges to have been and to be the law of Illinois; and (3) have to the present time continued as officers or directors of the City National Bank and Trust Company, and who are alleged by petitioner to have concealed

and to be now concealing the liability of said bank under the statute of Illinois then and now in force (*Ill. Rev. Stats.*, Chapter 16½, Section 12).

Your petitioner contends that the period of six years has not expired because (1) the defendants had resorted to fraudulent concealment, and were still practicing that concealment; and (2) the liquidation of collateral and the enforcement of stock-holders' double liability within the six years constitute transactions in the completion of the *act* upon which the suit is based, and that no cause of action accrued until damages could be known to such an extent that they could be made the basis of a suit.

The Circuit Court of Appeals takes the position that the six year period began with the transactions of 1932, and that no suit could be brought after the expiration of six years from 1932, either by the showing of fraud or by showing that a complete and present cause of action had not accrued during that period (R. 94-95, 97).

Although it held that there was lack of jurisdiction because of the running of six years, the Circuit Court of Appeals took occasion to state that there was no allegation or proof of fraud (R. 96), and to include in the opinion an unverified table (R. 96, 53), although the record contains the certified copy of a court order showing a Government loss of some fifteen million dollars (R. 67-69). The Circuit Court of Appeals also alleges an absence of proof by petitioner in a case where there had been a denial of jurisdiction and no trial with opportunity to make proof (R. 96). Your petitioner states that existence of fraud was sufficiently alleged in the complaint (R. 15-21).

During the pendency of this suit, an amendatory act was passed, and approved December 23, 1943 (Appendix II hereto), which in no way affects the six-year period within which suit may be brought; but which confers upon the Attorney

General a broad power to take over cases, and materially reduces the recovery on behalf of the person originally bringing the suit. In view of the fact that both the original and amended complaint were served upon the Department of Justice (R. 33-34), your petitioner contended that the act of 1943 did not apply to this pending case. The issue was preserved (R. 77) and argued before the Circuit Court of Appeals by the parties and by a representative of the United States, but the opinion of that Court makes no reference to that issue. Petitioner preserved the constitutional issue as to whether the amendatory act, if applicable to this suit, deprived petitioner of property without due process of law, in violation of the Fifth Amendment (R. 38, 77). This issue was argued in the Circuit Court of Appeals by the parties and by a representative of the United States, and that Court said that it was unnecessary to pass upon the constitutional questions in view of the fact that it sustained the ruling of the District Court in dismissing the action for lack of jurisdiction (R. 97).

Errors Relied Upon.

The United States Circuit Court of Appeals erred:

(1) In holding that action must be brought within six years from an initial transaction of the act sued upon, and that fraudulent concealment does not toll the running of time nor do other and later transactions which are parts of the same act;

(2) In holding that there was no fraudulent concealment in this case, and no proof thereof, petitioner having had no opportunity to prove his charges which were sufficiently set forth in the complaint;

(3) In holding that a limitation of time upon a period of suit such as that here involved begins to run before a complete and present cause of action has accrued, and in disregarding the fact that some transactions in the act sued on accrued during the six years;

(4) In affirming the dismissal of this suit for lack of jurisdiction, and in failing to pass upon the issues (a) as to whether the amendatory act of 1943 applies to this case in authorizing the Attorney General to take the case from petitioner; and (b) as to whether that act if applied to pending cases violates the Fifth Amendment in depriving petitioner of a vested interest.

ARGUMENT.

I.

The Time Has Not Expired within which Suit May Be Brought

(a) *The six-year statutory period is affected by fraudulent concealment.* The Circuit Court of Appeals says that the six-year provision is a jurisdictional requirement which is not tolled or extended on account of fraud (R. 94-95, 97). In reaching this conclusion the Circuit Court disregards the case of *Exploration Company* v. *United States*, 247 U. S. 435 (1918), although this case was presented both in brief and oral argument.

The *Exploration* case presents an issue parallel to that here involved. Each involves a public interest — that as to patents for public land, and this as to protection against fraud in transactions with the Government. Each involves a general statute with a clause limiting the period of suit. The language used by the two is legally identical. That involved in the *Exploration* case provides that "suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." The statute now before this Court provides as to *qui tam* actions that: "Every such suit shall be commenced within six years from the commission of the act, and not afterward."

In *Exploration Company* v. *United States*, 247 U. S. 435, this Court, at page 447, quoted with approval *Bailey* v. *Glover*, 21 Wall. 342, as follows:

> "To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law

> which was designed to prevent fraud the means by which it is made successful and secure."

This Court further said at page 449:

> "We are aware of no good reason why the rule, now almost universal, that statutes of limitations to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the government as well as a private individual. It is not our belief that Congress intended that the government should be deprived of title to public lands by those who added to the fraud by which they were obtained, artifices which enabled them to conceal the fraudulent manner in which they were secured until the action was supposed to be barred by the lapse of six years."

To sustain its opposing position, the Circuit Court of Appeals cites *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638; *A. J. Phillips Co.* v. *Grand Trunk Western Railway Co.,* 236 U. S. 662; and its own case of *Wisconsin Bridge and Iron Co.* v. *Illinois Terminal Co.,* 88 F. 2d. 459, no one of which involves fraud or is relevant to the issue under consideration. Nor is the Court's position sustained by the two additional opinions cited by the Circuit Court of Appeals. *Bell* v. *Wabash Ry. Co.,* 58 F. 2d, 569, involved no issue of fraud, although the Court properly stated that suit under the Federal Employers' Liability Act was not extended by fraud or concealment. In *Pollen* v. *Ford Instrument Company,* 108 F. 2d. 762, the Court held that the right of action for infringement of patents was limited to six years by statute, and cited the *Exploration* and *Glover* cases in support of a statement that: "It is the unquestioned rule that in suits based on fraud the statute of limitations does not begin to run until discovery of the fraud."

(b) *Fraudulent concealment is sufficiently alleged in the complaint, and proof cannot be made until there is a trial, and the record shows a material loss to the government.* The Circuit Court of Appeals states that there was no concealment and

denies that there was fraud. It also says that there was no showing by allegation or proof that reliance was placed upon the assets in making the loan (R. 95, 96). The allegations of the complaint are as complete as possible (R. 17-20), and no opportunity has been given to present proof.

In the effort to relieve the defendants from liability or criticism, the Circuit Court of Appeals says that petitioner inconsistently claims that information was subsequently concealed from the Comptroller of the Currency and his General Counsel and from the Reconstruction Finance Corporation when they originally had full knowledge of all the facts (R. 95). But the Circuit Court's quotation from petitioner's brief clearly shows that knowledge by certain government officers did not prevent fraudulent concealment from others (R. 95). And the Circuit Court of Appeals has created a new principle in assuming that persons now in office are familiar with all that was known to their predecessors in 1932, and are so familiar even though currently required bank reports do not give them the required information (R. 19).

The Circuit Court also claims that there is an effort to create an inference of guilt against the Attorney General "who, after becoming acquainted with all the facts, chose not to prosecute an appeal on behalf of the Government." At the time when this suit was commenced the Attorney General was informed and decided to take no active part therein (R. 36-37). There is no inference against the Attorney General because he initially took no share in the case and later confined himself to his right to appear under the amendatory act of 1943 and to defend the validity of that act.

With respect to the liability of the City National Bank and Trust Company to the Reconstruction Finance Corporation for the $50,000,000 which it obtained of the $90,000,000 loan, without obligations "of any kind or character whatsoever other than the said deposit liabilities," petitioner insists that there

was a violation of the Illinois banking law which requires an assumption in writing of "all the liabilities of said corporation as shown by its records" when one bank takes over the assets of another. (*Ill. Revised Statutes,* Chapter 16½, Section 12). In connection with the opinion of General Counsel to the Comptroller of the Currency regarding this transaction, attention may be called to the fact that weight was not so much given to an alleged validity of the transaction but to the fact that the Reconstruction Finance Corporation had "knowledge of the entire situation" and the General Counsel said that: "I feel sure that the courts would hold that the Reconstruction Corporation would be estopped from raising the point that it, as a creditor, was not included among the creditors whose debts were not assumed under the contract" (R. 61-62).

The Circuit Court of Appeals finds that there was no misrepresentation of the value of assets pledged for the loan of $90,000,000, and in order to sustain this position adopts a report which it says was confirmed (R. 96), but as to which the record shows no confirmation or certification but only a statement to this effect by respondents (R. 53).

On the other hand, the record shows a certified copy of an order entered by the United States District Court on May 16, 1944, with respect to the receivership of Central Republic Trust Company (R. 67-70). The statement in this order has not been attacked and cannot be attacked. This order shows that there remained "unpaid to the Reconstruction Finance Corporation in excess of the sum of Three Million Five Hundred Thousand Dollars ($3,500,000.), plus certain interest on said Thirty Million Dollars ($30,000,000.) note and in excess of the sum of Fourteen Million Five Hundred Thousand Dollars ($14,500,000.) plus certain interest on said Fifty Million Dollar ($50,000,000.) note." The order authorizing a payment of $300,000, and defendants' motion to dismiss (R. 53) claimed that the value of unliquidated collateral security amounted to $2,350,000. Deducting these amounts would leave an indebtedness in excess of $15,350,000 plus certain interest. Upon

such computation this would leave a loss to the national government of $14,905,377.38 *plus certain interest.* In 1939, the same Circuit Court of Appeals made the statement: "That the collateral was grossly inadequate to secure the loans must have been well known to all who were familiar with the actual facts." *Reconstruction Finance Corporation* v. *McCormick,* 102 Fed. (2d) 313, 323. The opinion of the Appellate Court of Illinois for the First District in *McIlvaine* v. *City National Bank & Trust Co.,* 314 Ill. App. 496, at page 525, indicated the absolute insolvency of the bank at and prior to its transaction with the Reconstruction Finance Corporation. The Court there said: " . . . the assets of the bank were insufficient by from $17,000,000. to $21,000,000. to meet the bank's liabilities on October 5, 1932, and for several months prior thereto . . . . the bank was a financial failure at the time of the transaction . . . . " "The RFC is not a charitable institution or an experimental laboratory. Its statutory duties require it to make loans on sound business principles." *Aluminum Inc.* v. *Reconstruction Finance Corporation,* 151 Fed. (2d) 652.

(c) *The cause of action accrued within six years; and transactions in the act upon which suit is based have occurred during that period.* Section 235 of Title 31, U. S. Code (*Revised Statutes,* Section 3494) which applies to this suit, provides that:

> "Every such suit shall be commenced within six years from the commission of the act, and not afterward."

This language is applicable to Section 231 of Title 31 (*Revised Statutes, Section* 3490, 5438) which defines the cause of action, and provides that the violator of the action

> "Shall forfeit and pay to the United States the sum of $2000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act, together with the costs of the suit; and such forfeiture and damages shall be sued for in the same suit."

The provisions of the two sections must be construed together.

Forfeiture and damages must be known to such an extent that they may be sued for in the same suit.

The issue as to the running of six years is one of fact as to successive transactions in the initiation and completion of the act. The essential transactions which constitute the single act of fraud are set out in the amended complaint (R. 15-20). The case here involves the continuous conduct of certain individuals, and the conduct of the successor City National Bank and Trust Company of Chicago since the transfer to it of $50,000,000, such transfer being in fact a transfer from the individuals to themselves without regard to safeguards of state statute. The act complained of is not the $90,000,000 loan from the Reconstruction Finance Corporation nor the transfer of $50,000,000 to the successor corporation, but the fraud of which these transactions constitute a part. If the period for the running of the six years should start on the day of the loan in 1932 or on the formally prescribed day of maturity in 1932, there is no remedy for a fraud which does not accrue until more than six years after the date of maturity of the loan.

It is established that a statute of limitations begins to run after the cause of action has accrued, and that the accrual means "a complete and present cause of action." *Rawlings* v. *Ray*, 312 U. S. 96. Suit for the forfeiture and damages must be united, and a cause of action for damages exists only when the damage has accrued and the extent of damage can be measured.

The payment of $90,000,000 was grounded in fraud in that it was made on a misrepresentation, now revealed through liquidation under the terms of the loan; and the transfer of assets to the City National Bank and Trust Company was grounded in fraud in that such bank, its officers and directors were participants in the transfer and have sought to conceal the liability of such bank.

The amended complaint presents two transactions: (1) the transaction by which, through misrepresentation, the individual defendants in this case obtained for the Central Republic Bank and Trust Company a loan of $90,000,000 from the R. F. C., secured by certain collateral, by the right to demand additional collateral, and by the liability of stockholders, with knowledge that the later liquidation of available collateral and enforcement of stockholders' liability would not pay such loan, there now being a shortage of more than $15,000,000 as a result of such misrepresentation and fraud; (2) the transaction by which the individual defendants herein while acting as officers or directors of the Central Republic Bank and Trust Company transferred assets of that company to the City National Bank and Trust Company which they helped organize and of which they became and have remained directors and officers to the present day; and by which such bank and the individual defendants as officers or directors thereof in official reports have concealed until the present the obligations of said bank to pay to R. F. C. the deficit on the loan, and have thus sought to obtain the payment from R. F. C. of a fraudulent claim for such amount.

The six year period under the statute begins to run when there is a complete and present cause of action. Damages as well as forfeiture must be sued for in the present case and some measure of damages must exist before the "commission of the act" constitutes a complete and present cause of action. The day of the loan (June 27, 1932) gives no such cause; the final payment by the R. F. C. on the loan (Oct. 6, 1932) also gives none; the maturity date (Dec. 24, 1932) also gives none; the right to demand additional collateral, exercised on December 2, 1933, might have defeated fraud, if the demand had been capable of obedience, just as would the demand for immediate payment, on July 17, 1934.

The litigation of stockholders' liability might, under certain conditions, have compensated for the fraud, and the completion

of this litigation on October 9, 1939, has reduced the measure of damages by more than $10,000,000. The liquidation of collateral has also been necessary, and something still remains of liquidation and of stockholder liability collections.

The "commission of the act," upon which suit rests, involves a number of steps in the same transaction which lead to a complete and present cause of action, with a measure of damages upon which suit may be based.

With respect to the loan and its liquidation, something of a parallel presents itself with respect to engineering work carried on over years after a contract had been entered into. In such a case, *Bay City* v. *Frazier*, 77 Fed. (2d) 570 (6th Cir. 1935), the Court said:

> "The transaction was an entirety, requiring the performance of continuous service, and the action was not barred until six years after the conclusion of the service."

The misrepresentation as to collateral in obtaining the loan on June 27, 1932, is not alone the "commission of the act" which damages the Government. The cause of action accrues with reference to the damage occasioned by the misrepresentation, and, until such damage is occasioned and on a specific basis, no basis for damage exists. The fraud might still have been avoided by giving sufficient additional collateral as provided by the terms of the loan, and as demanded on December 2, 1933; by an immediate payment on demand of July 17, 1934; or by a miraculous sale of collateral already held, together with collections from stockholders under the decision of the Circuit Court of Appeals in 1939. *Reconstruction Finance Corporation* v. *McCormick*, 102 Fed. (2d), 305, certiorari denied, 308 U. S. 358. The fraud could not be shown or reduced to figures so long as it was possible to avoid the liability otherwise occasioned by the initial misrepresentations. There must not only be a misrepresentation but a resulting measurable loss.

Not only has the fraud here been a continuous one, but it is

of such a character as to be concealed from those who might have brought suit thereon. There have been no public investigations, and prior litigation gave no notice of the fraud involved in this case. The question as to concealment is a federal question. *Rawlings* v. *Ray*, 312 U. S. 96.

II.

The Amendatory Act of 1943 Does Not Authorize the Attorney General to Take Over This Case, Because That Act Exempts Cases in which Information Was Furnished to the Attorney General.

The amendatory Act of 1943, which became effective on December 23, 1943, requires a sixty-day notice to the Attorney General of cases then pending, and authorizes him within such sixty days to enter the appearance of the United States. Upon such appearance the case is carried on solely by the United States; but the person originally bringing the suit may carry it on if the United States fails to carry it on with due diligence within a period of six months or within such additional time as the court after notice may allow. But jurisdiction in pending cases is completely withdrawn where the case is based on information in the possession of an agency of the United States, unless based upon information voluntarily disclosed by the plaintiff to the Attorney General before suit was filed, and not theretofore in the possession of the Department of Justice.

Clause (C) of Section 3491 of the Revised Statutes, as amended by Public Law 213, approved December 23, 1943, provides:

> "The court shall have no jurisdiction to proceed with any such suit brought under cause (B) or pending suit brought under Section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof,

> at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending at the effective date of this Act if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice."

Under this provision no court retains jurisdiction in a suit under this Act pending on December 23, 1943, if based on information in possession of an agency of the United States, unless the person bringing suit, before the suit was filed, had in his possession and voluntarily disclosed to the Attorney General information not theretofore in the possession of the Department of Justice. In the present case a federal agency was in possession of information, but information not theretofore in the possession of the Department of Justice was disclosed to the Attorney General.

Two transactions contributing to a single fraud are here involved: (1) the $90,000,000 loan by the Reconstruction Finance Corporation to the Central Republic Bank and Trust Company; and (2) the use of $50,000,000 of such loan to finance the new City National Bank and Trust Company. Both transactions are still open. The $90,000,000 loan is in part unpaid, and according to the records of the District Court (order of May 16, 1944) and defendants' estimate of value of remaining unliquidated collateral (Defendants' Motion to Dismiss, R. 53), there will be a final deficit and loss to the United States of more than $15,350,000 plus unknown amounts of certain interest (R. 67-69).

The liability of defendants with respect to these transactions has never been litigated nor has the basis of such liability been publicly disclosed. The intimate relationship between the Reconstruction Finance Corporation and the Bank, at the time of the loan (June 27, 1932) indicates that a federal agency knew the facts.

The case of *Reconstruction Finance Corporation* v. *Central Republic Trust Co., et al.*, 17 Fed. Supp. 263 (affirmed 102 Fed. (2d) 305, cert. denied 308 U. S. 552) involved the stockholders' liability, and not the present issues; and the complaint does not rely upon this action, although this court did say in that case that the loan was made "with full knowledge of the facts, —of the bank's inability to repay the loan." (102 Fed. (2d) 323.) Stockholders have been held liable for the loan, and, as of January 31, 1944, there had been a collection from them of $10,596,217.46; but, there has been no liability sought to be imposed upon the defendants, who profited by the transaction.

In order to show that some of the agencies, officers or employees of the United States were familiar with the transfer of $50,000,000 to the City National Bank and Trust Company, defendants attached to their Motion to Dismiss a memorandum of October 5, 1932, addressed to the Comptroller of the Currency by the General Counsel, Division of Insolvent National Banks. The memorandum dealt with the liability of the new bank under the Illinois statute with respect to the $50,000,000 transferred to it, and concludes:

> "I am most emphatically of the opinion that no court would hold that the Reconstruction Corporation could actively participate in this transaction, and furnish the money for its consummation, with a knowledge of the entire situation, and at the same time preserve the status of an unknown or unlisted creditor vested with power of attack upon the very transaction it helps to culminate. I feel sure that the court would hold that the Reconstruction Corporation would be estopped from raising the point that it, as a creditor, was not included among the creditors whose debts were assumed under the contract." (R. 61).

This statement clearly indicates a knowledge of fraudulent conduct and a desire to avoid the results of such conduct. An agency of the United States was acquainted with the facts; and this makes it more important that some one be permitted

to protect the government, if the Attorney General lacked acquaintance with the facts. And it is also clear that, as to suits pending on December 23, 1943, under the federal statute it was sufficient to inform the Attorney General in order to maintain the suit, even though the facts were known to other federal agencies. The purpose is to permit some degree of disciplining to be exercised by the Department of Justice. In the present case, there has been no assertion that the Attorney General was in possession of the information before such information was furnished by plaintiff.

The present case involves the liability of the City National Bank and Trust Company and the liability of certain individuals who were directors of the Central Republic Bank & Trust Company, and who became organizers and directors of the City National Bank and Trust Company.

The original complaint, filed June 22, 1943, presented for the first time substantial information not in the possession of the Attorney General as to such liability. A copy of this original complaint was, at the time of its filing, on June 22, 1943, furnished by the plaintiff to the United States District Attorney for the Northern District of Illinois and was transmitted at plaintiff's request to the Attorney General of the United States, and the Attorney General advised that the District Attorney observe the proceedings but take no active part therein (R. 36, 37).

The original complaint in this case was replaced by an amended complaint, which adds several parties, presents additional issues and deals in somewhat greater detail with the liability above indicated. Such amended complaint was filed on August 19, 1943, and a copy was on such day filed with the District Attorney for the Northern District of Illinois. Such District Attorney and the Attorney General had in their possession since June 22, 1943, the information then again furnished to them in somewhat greater detail (R. 15, 36-37).

The amended and substituted complaint "superseded the prior pleadings in the case". *Grubbs* v. *Smith*, 86 Fed. (2d) 275. "The amended complaint was filed under the order of the court. An amended complaint which is complete in itself, and which does not refer to or adopt the original complaint as a part of it, entirely supersedes its predecessor, and becomes the sole statement of the cause of action." *United States* v. *Gentry*, 119 Fed. 70, 75. The original complaint which was served by the plaintiff on the District Attorney and Attorney General was information furnished to the Attorney General not theretofore in the possession of the Department of Justice, and additional information was furnished by the Amended Complaint.

There has been long-drawn-out litigation establishing the double-liability of shareholders who suffered from the transactions involved in the present case, but no litigation or investigation involving the defendants herein who profited by the transaction. *Reconstruction Finance Corporation* v. *Central Republic Trust Co., et al.*, 17 Fed. Supp. 263, affirmed in *Reconstruction Finance Corporation* v. *McCormick, et al.*, 102 Fed. (2d) 305.

That information was furnished to the Attorney General is shown by the uncontradicted affidavit in the record (R. 36, 37). That it was received and acted upon by the Attorney General is further shown by the uncontradicted affidavit.

The statute makes no requirement as to the manner in which information should be furnished to the Attorney General. The original and amended complaints gave such information, and with respect thereto the Attorney General had the same legal rights as if it had been furnished in another form.

The amended complaint was filed more than four months before the enactment of the statute requiring such information. The amended complaint was filed on August 19, 1943.

The act came into effect on December 23, 1943. On January 21, 1944, one of the attorneys for plaintiff filed an affidavit that information had been given to the Attorney General (R. 36, 37). At no time were the statements of this affidavit denied.

On January 21, 1944, plaintiff filed objections to the application of the act of December 23, 1943, as violative of the 5th Amendment (R. 32-34), and a certificate as to such issue was forwarded to the Attorney General (R. 38). This issue was again presented on March 21, 1944, in a motion to strike the appearance of the United States (R. 45). Plaintiff clearly has a right to test the validity of a requirement before being under a duty to comply therewith; and has a right to comply with such a requirement after such test, if the requirement is held to be valid. The statute itself says that there is no abatement if the information was disclosed, and does not require that a complaint, filed before the statute was enacted, contain a statement that such information was disclosed. The record clearly shows that information was voluntarily disclosed to the Attorney General by the plaintiff (R. 36, 37).

Under the proviso to clause (C) of section 3491 as amended on December 23, 1943, no abatement is had of a pending suit if information had been properly disclosed to the Attorney General. The statute provides for two possible abatements of a pending suit: (1) a stay of proceedings for sixty days within which the Attorney General may appear and carry on the case, and a further period of six months with such additional time as the court may allow the Attorney General to carry on the suit, together with a power to dismiss; (2) an ending of the suit where information is in the hands of a governmental agency, and was not disclosed to the Attorney General. The provision that no abatement shall be had where there is such voluntary disclosure by the plaintiff forbids both the stay of proceedings and the dismissal of the suit.

The purpose of the proviso is clearly to give some advantage to plaintiffs in pending suits in which advance informa-

tion had been given to the Attorney General. This advantage lies only in the right to continue the case without its being taken over by the Attorney General. It can have no other meaning.

The purpose of the sixty-day abatement as provided in this statute is to give the Attorney General a period within which to enter an appearance on behalf of the United States. The amending statute denies such an abatement under the facts of the present case, and necessarily denies any authority in the Attorney General to enter an appearance and to take over the case on behalf of the United States. The pending suit proceeds in the same manner as theretofore provided by statute.

The term "abatement" as a legal term is employed in two senses. In common law it normally means a destruction of the suit; in equity it signifies a present suspension of the proceedings. The statute here involved abates an informer's proceeding for a fixed period in order that the United States may enter an appearance and carry on the case. The clause here involved exempts this case from such abatement and from such entry of appearance, if certain facts exist. Such facts exist in the present case. The Congress in adopting this measure shows an intention to exempt certain pending suits of the type indicated by the act and involved in the present case.

The proviso is attached to a sentence which says that the court shall have no jurisdiction to proceed with a suit based upon evidence or information in the possession of the United States or any agency, officer or employee thereof. A proviso is normally construed as making an exemption from the clause or paragraph to which it is annexed, unless a different intent is indicated.

The extent of exemption by a proviso is dependent upon the language and the intent. The purpose is clearly that of preserving the rights of parties in certain suits pending at the

time the amended act came into operation. The paragraph to which it is attached withdraws jurisdiction in certain cases, and authorizes the United States within sixty days to enter an appearance, after which the suit is "carried on solely by the United States." The same sixty-day period is provided for pending suits by clause (D).

The taking over by the United States is an abatement as to the parties, either temporary or permanent. The withdrawal of the jurisdiction is an abatement of the suit. In providing that "no abatement shall be had as to a suit pending at the effective date of this Act," the term abatement would naturally apply to two types of such abatement dealt with in the same clause. The language is so employed as to include both types of abatement.

Had the proviso been intended merely to except a certain type of pending case from the denial of jurisdiction, this would have been done in a simpler manner, and without the use of a broader term. The bill was adopted as a compromise measure, reported by a conference committee of Senate and House. In its report (Congressional Record, 78th Congress, 1st Session, p. 10,845; December 17, 1943), the committee said:

> "It will not be possible to abate a pending suit if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice."

This language clearly means that it is not possible to delay or defeat such pending suits.

Francis E. Walker, one of the managers on the part of the House of Representatives, in explaining the conference report upon the bill as finally passed, said (Congressional Record, p. 10,846):

> "But if there are any actions brought in good faith by informers, then, under this compromise measure, those

informers will have the right to proceed with their actions and recover."

Clearly there was no intent in such cases to stay the suit for sixty days and to authorize a further delay of six months plus such further time as the Court might allow, together with a power of the Attorney General to dismiss.

III.

The Amendatory Act of 1943 Is Not Constitutional in so far as It Applies to Pending Cases.

As to suits pending when this Act came into effect on December 23, 1943, the legislation raises the issue as to whether the person suing under the original act of February 14, 1863, may be deprived of the control of his case and have a reduction made in the amount which he may recover; or may be deprived of all or any rights under the original act.

The act, before its amendment in 1943, provided that (1) "Such suit may be brought and carried on by any person, as well for himself as for the United States;" (2) that it "shall be at the sole cost and charge of such person;" (3) that it may not be dismissed by the United States; and (4) that the person bringing suit shall be entitled to one-half of the double damages provided by the statute.

Suit by the person was explicitly authorized and he had the sole burden of cost. In *United States* v. *Hess*, 317 U. S. 537, 545-546, 63 S. Ct. 379, 385, this Court strongly infers that the informer has a property interest in the suit since the "recovery was obtained at the risk of a considerable loss to the petitioner since Section 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of litigation."

It is to be noted that the defendants considered the costs so substantial that they requested the trial court to enter an order that plaintiff file a surety bond for the costs (R. 11). This the plaintiff did (R. 12).

By the statute in force when the pending case was instituted, the government of the United States offered a reward

to persons who might succeed in protecting the government against frauds, and the person who accepted this offer took a risk of loss. Thus was established between the two — the plaintiff and the United States Government — a contractual relation, with continuing obligations upon the part of both parties. It is established that a reward is revokable at any time before it is accepted, and before anything has been done in reliance upon it (*Shuey* v. *United States*, 92 U. S. 73; *United States* v. *Connor*, 138 U. S. 61), but the court in these opinions recognized that a contract arises if "anything has been done in reliance upon it" or if "something has been done to complete a contract or settle and establish a right under the offer."

In the case of *Lynch* v. *United States*, 292 U. S. 571, 577, this Court said that "War Risk policies, being contracts, are property and create vested rights." Speaking for a unanimous court, Mr. Justice Brandeis said, at page 579:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment."

In *Pritchard* v. *Norton*, 106 U. S. 124, the Court properly said that "a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."

In *Coombes* v. *Getz*, 285 U. S. 434, directors of a corporation were held to a double liability by virtue of a clause in the Constitution of California which was repealed while an appeal in the case was pending, the Court holding that a contractual obligation arose by virtue of the constitutional provision and that the right to enforce it became vested and within the protection of the contract clause and the Fourteenth Amendment.

A contractual obligation previously assumed by the government of the United States becomes controlling under the Fifth Amendment, even though legislation may change congressional policy for the future. The government is bound in the same manner as an individual, when it becomes a party to the contract.

Under the statute here involved the informer is the primary party in the case, and is recognized by statutory language as the person who brings and conducts the case, and pays the cost, and who has the right to discontinue the suit with the consent of the judge and the district attorney.

In this respect the present statute recognizes in him a vested interest not involved in other statutes construed by the courts. Difference in statutory language clearly indicates a difference in Congressional intent. For example, an informer under an act of 1861 was held to have no power to prevent the Attorney General from dismissing a suit, when he had no part whatever in the suit, nor was entitled to be heard as a party thereto at any stage of the proceedings. *Confiscaion Cases*, 7 Wall. 454. The Court said, as to the statute there involved, that suits were instituted in the name of the United States and prosecuted by the District Attorney and that:

> "Mention of the name of the informer, in the information, in such cases, is not necessary, as he is not a party to the suit, nor is he entitled to be heard, as such, at any stage of the proceedings. He cannot institute the suit or move for process, nor join in the pleadings, nor take testimony, nor except to the rulings of the court, nor sue out a writ of error, nor take an appeal."

Clearly no contractual or vested interest was created under such a statute, which had none of the provisions involved in the statute under which the present cause was instituted.

The act involved in *United States* v. *Morris*, 10 Wheat. 246 (1825) clearly did not vest a right until funds were collected.

It was agreed that it involved only an inchoate interest subject to the authority of the Secretary of the Treasury to direct the prosecution to cease. *M'Lane* v. *United States*, 6 Peters, 404 (1832) related to a right under the same statute which vested only after funds were collected.

In *United States* v. *Connor*, 138 U. S. 61, the Court found no vested interest in an informer under the Internal Revenue Law as amended in 1866 which was "emphatic that no right accrues" (when the informer provision was repealed in 1872) and the informer had no part in a suit and no claim except as fixed by the Secretary of the Treasury after the amount or proceeds shall have been paid.

In none of these cases was the informer a party to the suit nor charged with the cost thereof. In the present case the informer brought the suit; has borne all the expense; and was the only person charged with authority to dismiss the suit.

The vested interest of an informer in the case at bar, under the Act of 1863, is not comparable to eminent domain. This Court recently said in *United States* v. *Powelson*, 319 U. S. 266, 276, that:

> "The grant of the power of eminent domain is a mere revocable privilege for which a state cannot be required to make compensation."

And Mr. Justice Brandeis said in *Lynch* v. *United States*, 292 U. S. 571, 577, that:

> "Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right."

There is in the present case a vested right based upon an offer and acceptance, together with the expenditure of money, as in the *Lynch* case in which War Risk policies were held to be "rights against the United States arising out of a contract."

It may be urged that the legislation here involved deals only

with the jurisdiction, and that the amendatory act withdraws jurisdiction. If so, *Ex pare McCardle*, 7 Wall. 506, is applicable:

> "Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

But the legislation here at issue is aimed not at jurisdiction but at the right of parties in pending litigation, and such rights are "rights against the United States arising out of a contract," although they do not involve a liability of the United States. In proceedings such as that here involved, liability of the defendants still remains, and also jurisdiction as to this suit. The method of handling the case is altered; the parties are altered by the appearance of the United States and the rights of existing parties are sought to be altered, but jurisdiction remains. The issues remain the same; the parties remain the same; and the amounts of recovery remain the same.

The constitutional issue in the present case is parallel with that in *United States* v. *Griswold*, 24 Fed. 361 (1885), affirmed in 30 Fed. 762 (1887). An informer by the name of Dowell recovered a substantial amount. The Secretary of the Treasury sought to settle for a small amount which would have deprived the informer of the one half of the amount he had recovered. The trial court said that the judgment obtained by Dowell was "the private property of the prosecutor and cannot be released or satisfied without his consent, any more than if it had been obtained in a private action on the bond of the defendant." On review and affirmance it was said that: "While the secretary may, under the statute, compromise and release the interests of the United States, he cannot affect Dowell's righs, fully vested." In the *Griswold* case judgment had actually been obtained, but there is an equally vested

right where suit has been brought and expense incurred by the informer. The burden of cost is explicitly placed upon the informer by act of Congress which at the same time guarantees a possibility of reimbursement. There was a statutory offer and acceptance which constitute a contract and establish vested rights in the plaintiff. "Grants like the one under consideration are not nude pacts, but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. * * * They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance." Mr. Justice Hughes in *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179, 193.

The issue as to the validity of the present statute in its application to pending suits has already been considered by the United States District Court for the Southern District of New York in *United States of America on the relation of Richard Rodriquez, et al.* v. *Weekly Publications, et al.*, 54 Fed. Supp. 476 (March 14, 1944), the court in that case denying a motion to strike the appearance of the United States District Attorney. The opinion in that case was based upon the grounds (1) that the statute is merely an exercise of the recognized complete power of Congress to determine the jurisdiction of inferior federal courts; and (2) that there was no right vested by statute which could not at any time be revoked, and no vesting of rights until a recovery was had under the original act here involved. To these arguments we reply (1) that the right is not merely a matter of jurisdiction, and that jurisdiction has not been withdrawn, but has as to the present case been specifically reserved; and (2) that the statute here involved does vest a right prior to recovery, whereas the authorities cited in support of the Court's view involved statutes which did not vest rights prior to recovery. The distinction

has been pointed out above with respect to the cases primarily relied upon in the *Rodriguez* case in the District Court. A careful analysis of all cases relied upon in that case shows that the view of the Court is not supported by the authorities.

Upon appeal of the *Rodriguez* case to the United States Circuit Court of Appeals for the second circuit, the appeal was dismissed on July 28, 1944 (144 Fed. (2d) 186), Judge Augustus N. Hand saying for the Court:

> "In spite of the fact that we shall dismiss the appeal, because the order was not appealable, it seems proper to say, for the guidance of the District Court in future actions, that the claim of the relator that the amendment to the Informers' Act, if applied to him, would unlawfully deprive him of rights guaranteed by the Constitution can have no basis. The relator acquired no vested right prior to the date of the amendment. His privilege of conducting the suit on behalf of the United States and sharing in the proceeds of any judgment recovered, was an award of statutory creation which, prior to final judgment, was wholly within the control of Congress. *Norris* v. *Crocker*, 13 How. 429; *Western Union Telegraph Co.* v. *Louisville & N. R. R. Co.*, 258 U. S. 13; *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285; *State of Maryland* v. *Baltimore & Ohio Railroad Co.*, 3 How. 534. It is well settled that the repeal of a statute under which a suit for a penalty is brought terminates the plaintiff's right to recover. * * * We regard the claim that the act as applied to the relator is unconstitutional as wholly illusory."

In the *Rodriguez* case, the Circuit Court of Appeals limits its language to a suit for a penalty, and fails to distinguish between penalties imposed or privileges or gratuities granted by the national government on one side and contracts entered into by the national government on the other. The Court's statement properly applies to privileges and gratuities and to purely penal statutes and the decisions cited by it support such application.

We present an analysis of the cases cited in the *Rodriguez* case: Clearly no contract is involved in *Norris* v. *Crocker*, 13 How. 429 (1851) involving a statute which abolished a penalty recoverable for fugitive slaves who were regained, but left a common law remedy for damages. *Western Union Telegraph Company* v. *Louisville & Nashville Railroad Co.*, 258 U. S. 13 (1922) involved the withdrawal of the power of eminent domain, which the United States Supreme Court has recently said is "a mere revocable privilege." *United States* v. *Powelson*, 319 U. S. 266, 276. *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 258 (1883) involved damages done by a mob and "no elements of contract." *State of Maryland* v. *Baltimore & Ohio Railroad Co.*, 3 How. 534 (1845) involved a remission of certain penalties which were "regarded not as a contract with the delinquent party, but as the punishment for an offense." The opinion of Chief Justice Taney in the *Baltimore and Ohio* case refers to *United States* v. *Morris*, 10 Wheat. 246 (1825). As previously stated in this brief the *Morris* case involved only an inchoate interest subject to power in another to terminate the proceeding. In the *Morris* case as in other cases previously discussed, the government initially reserved control and the power to dismiss.

In the present case the statute created a contract when the plaintiff brought suit as authorized thereby, and the statute reserved no powers in the government to control or dismiss such a proceeding. There is a contract as definitely as the war risk policies contract involved in *Lynch* v. *United States*, 292 U. S. 571. There is a contract more definitely than that found to exist with public school teachers in *State of Indiana* v. *Brand*, 303 U. S. 95 (1937), in which the Court held that a contractual relation was established with teachers by a statute providing for an indefinite contract after a certain period of service, such contract to remain in force until succeeded by a new contract or cancelled as provided in the act.

We have in the present case a vested right based upon an

offer and acceptance, and involving the expenditure of money as in the case of war risk policies. Contracts can be made with reference to services to be rendered by the government to the individual or by the individual to the government. And the statute under which plaintiff brought his suit established a contractual relation and a vested interest to be protected under the Fifth Amendment.

The existence of such a vested right is recognized by the United States Circuit Court of Appeals for the Second Circuit, in *Sherr* v. *Anaconda Wire and Cable Company*, 149 F. 2d 680, in which certiorari was denied by this court on November 5, 1945. In that case the Court said:

> "It is indeed true, as the plaintiff has shown, that, since the Fifteenth Century, the English courts have held that the Crown could not by settlement or release bar a *qui tam* action, so far as the informer's interest was concerned; or indeed could not even discontinue it. Y. B. 1 H. VII, 3, a; *Stretton* v. *Taylor*, Cro. El. 138; *Hammon* v. *Griffith*, Cro. El. 583; *Dr. Foster's* case, 11 Coke 65b (note); 3 Coke, Institutes 237. Moreover, in *Couch* v. *Jeffries*, 4 Burr. 2460, Lord Mansfield, in construing a statute not to be applicable to an action that had gone to verdict, though not to judgment, used this language: 'Here is a right vested; and it is not to be imagined that the Legislature could by general words mean to take it away from the person in whom it was so legally vested, and who had been at a great deal of cost and charge in prosecuting.' Hence although the reversal in *Nathanson* v. *United States*, 321 U. S. 746, did not touch the point, the decision in *United States* v. *Baker-Lockwood Manufacturing Co.*, 138 Fed. (2) 48 (C. C. A. 8) may be open to conceivable doubt; *i. e.* that by filing a later action the United States could take the conduct of an earlier *qui tam* action out of the informer's control. Moreover, we recognize the distinction between a statute which puts an end to a claim based upon a penalty (*Norris* v. *Crocker*, 13 How. 429), and one which, though it keeps the claim alive, deprives the informer of his 'vested' interest; giving him in exchange only a *quantum meruit* for the value of any

information which he may have contributed to eventual success. Section 232 E(1) Title 31, U. S. Code.

Here, there being no room for interpretation, the bare question before us is whether the act is unconstitutional as a violation of the Fifth Amendment. The argument is that Section 232, as it stood when the plaintiff brought the action, was an offer, of which the mere filing of the complaint was an acceptance, and that the contract so arising was 'property', which 'vested' in the plaintiff, and which the Constitution put it beyond the power of Congress to divest. We by no means agree that the contract —if there was one, which in turn we do not say that there was—created the kind of property which the Fifth Amendment protects (certainly when, as here, the informer had done nothing more than file the complaint; but we shall for argument assume that there was a contract and that it was protected by the Constitution. Even so, subdivision 3 was constitutional in putting an end to the jurisdiction of the district court. That would have been beyond any doubt, if the plaintiff had been no more than a representative of the United States to prosecute its claim; for in that event the United States might take over the prosecution, and relegate the plaintiff to his action in the Court of Claims upon whatever contract he might prove. Clearly he could not specifically enforce such a contract indeed, he could not have done so even against a private client. And if, as we are assuming, his 'vested rights' included a lien upon,—or, if one choose, even a partial assignment of,—the claim, the result is the same. For, even though then the act affected a 'taking' of property it would not be a 'taking' without 'just compensation', because he would again have recourse to the Court of Claims for whatever compensation the Constitution assured him; and that recourse is an adequate remedy. Section 250(1), Title 28, U. S. Code, *United States* v. *Lynah* 188 U. S. 445; *Hurly* v. *Kincaid*, 285 U. S. 95; *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18."

It will be noted that the Amendatory Act of 1943 permits the Attorney General to exercise his discretion in handling the case and to destroy completely any possibility of the in-

former recovering damages either in the suit in the District Court or by claim in the Court of Claims. Consequently, the statement that recourse to the Court of Claims is an adequate remedy is a meaningless statement which has no support in fact and no basis in law. This situation is most apparent in the case at bar in view of the fact that the Attorney General, after being furnished information by the plaintiff, observed the proceedings in the District Court but took no part therein. (R. pp. 36-37).

CONCLUSION

Plaintiff respectfully submits that:

(1) This suit was brought within the time specified by statute;

(2) With contractual rights accrued under an existing statute, plaintiff's control of the pending suit and his rights thereunder should not be effected by a subsequent amendatory statute;

(3) If the subsequent statute is held to apply to this suit, plaintiff should have been allowed to continue in control of the case because of disclosures which he voluntarily made to the Attorney General, and the only effect of the subsequent statute would be upon the amount which he might receive;

(4) Even if it is held that the suit may be taken over and carried on solely by the United States, plaintiff retains continued jurisdictional rights subject to re-assertion if the United States fails to carry on the suit with due diligence.

Respectfully submitted,

WALTER F. DODD
HARRY G. FINS
Attorneys for Petitioner